No. 91-72

# In the Supreme Court of the United States

OCTOBER TERM, 1991

FEDERAL TRADE COMMISSION, PETITIONER

*v.*

TICOR TITLE INSURANCE CO., ET AL., RESPONDENTS

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF FOR HARTFORD FIRE INSURANCE CO., ET AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

The amici curiae will address the following question:

Whether collective ratemaking concededly authorized by state law was "actively supervised" by state officials, and therefore immune from antitrust scrutiny under *Parker* v. *Brown*, 317 U.S. 341 (1943), where the rates were subject to review by state regulators who had the power and the duty to overturn rates that were inconsistent with the public interest.

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## INTEREST OF THE AMICI CURIAE

The amici are (1) four primary insurance companies: Aetna Casualty and Surety Co.; Allstate Insurance Co.; CIGNA Corp.; and Hartford Fire Insurance Co.; (2) Insurance Services Office, Inc., a licensed property-casualty rating and advisory organization consisting of 1400 insurance companies participating in the United States; (3) five domestic reinsurance companies: Constitution Reinsurance Corporation; General Reinsurance Corporation; Mercantile & General Reinsurance Company of America; North American Reinsurance Corporation; and Prudential Reinsurance Company; (4) the Reinsurance Association of America, an association of domestic reinsurers; and (5) Thomas A. Greene & Co., a domestic reinsurance broker. Amici all are defendants in *In re*

*Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991). They have a vital interest in the outcome of this case for two principal reasons.

First, amici are subject to state insurance regulatory systems that resemble those at issue here. Amici thus could be affected directly by a decision holding that, despite the existence of a clearly articulated state policy to displace competition with regulation in the insurance field, insurance companies may be sued under the antitrust laws if state regulators do not look closely enough at the rates filed with them.

Second, amici are already under attack by the attorneys general of several States for engaging in statutorily authorized collective activity to develop forms for commercial general liability insurance. See *In re Insurance Antitrust Litigation*, *supra*. In that litigation, the district court upheld amici's state action and McCarran-Ferguson Act defenses. On the state action issue, the Ninth Circuit reversed on the theory that state regulators, although approving jointly developed insurance forms, had not reviewed an alleged boycott in the forms development process. Various state attorneys general who are plaintiffs in *Insurance Antitrust Litigation* have joined an amicus brief in this Court in support of the FTC's position in this case, specifically arguing (Am. Br. 21) that the Court should rely on the Ninth Circuit's decision.

In fact, that decision is not relevant here because it turned on a legal issue wholly distinct from the questions presented by the FTC in this case. As the attorneys general themselves acknowledged in their response to the rehearing petitions filed before the Ninth Circuit in *Insurance Antitrust Litigation* (at 9), "[p]laintiffs have never claimed * * * that state officials were negligent in their duties of review and supervision." The record in *Insurance Antitrust Litigation* leaves no doubt that the proposed insurance forms were the subject of continuous



discussions with state regulators from 1984 through 1986 and were addressed both at public hearings and forums before insurance regulators in 35 States and at meetings of the National Association of Insurance Commissioners.

The Ninth Circuit in *Insurance Antitrust Litigation* instead accepted the argument advanced by the attorneys general that "the offending conduct, boycotts, was never submitted to [state regulators] for review and supervision" (Response to Reh. Pet. at 9). The court of appeals, observing that "state approval of one activity is not state approval of a related but distinct activity" (938 F.2d at 931), believed that the States' authorization and approval of the collective development of insurance policy forms did not approve the alleged "boycotts used to produce agreement on the forms." *Ibid.*

Amici will soon file a petition for a writ of certiorari asking this Court to review the Ninth Circuit's decision, which has far-reaching implications not only for interpretation of the state action doctrine but also for interpretation of the McCarran-Ferguson Act.[1] Amici thus have an

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[1] In defining the state action issue presented here, it should be emphasized that this Court, the lower courts, and the Solicitor General all have agreed that the distinct McCarran-Ferguson immunity for the business of insurance does not turn on a federal court's assessment of the adequacy or effectiveness of the state regulation. See, *e.g.*, *FTC* v. *National Casualty Co.*, 357 U.S. 560, 564 (1958); *Ohio AFL-CIO* v. *Insurance Rating Board*, 451 F.2d 1178, 1184 (6th Cir. 1971), cert. denied, 409 U.S. 917 (1972); Brief for the United States as Amicus Curiae at 26-27 n.15, *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979) (No. 77-952) ("state regulation of the business [of insurance] need not be affirmative or effective to supplant the antitrust laws [under the McCarran Act]"). As the Solicitor General has acknowledged,

> The requirement that a state must regulate the particular conduct at issue in order to bring it within the [McCarran Act] exemption does not require the courts to determine whether the state's regulatory power is effectively exercised. * * * [T]his Court reject[ed] * * * the argument in *FTC* v. *National Cas-*

interest in ensuring that the Court in this case does not prematurely address what, as we demonstrate below, is the quite distinct state action issue presented in *Insurance Antitrust Litigation.*

## INTRODUCTION AND SUMMARY OF ARGUMENT

I. This Court determined in its landmark decision in *Parker* v. *Brown*, 317 U.S. 341 (1943), that Congress did not intend to preempt state authority to engage in economic regulation when it enacted the Sherman Act. Relying on "principles of federalism and state sovereignty," the Court held that the States retained the power to impose regulatory regimes based on conceptions of the public interest different from the free competition mandate of the antitrust laws. *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1349 (1991). In recent years, the Court repeatedly has shaped *Parker*'s state action doctrine to preserve the States' ability to choose from among a broad range of regulatory alternatives.

In this case, there is no dispute that the four States clearly articulated a policy of supplanting competition with regulation, authorizing collective setting of rates for title search and examination services. The sole question is whether the States "actively supervise" that private conduct—whether state officials "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick* v. *Burget*, 486 U.S. 94, 101 (1988).

That inquiry focuses on the structure of the regulatory system established by the applicable state law. In the four States whose regulatory systems are at issue

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*ualty Co., supra*, that the exemption is unavailable merely because the state has not exercised its regulatory authority.

Brief for the United States as Amicus Curiae at 27 n.38, *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119 (1982) (No. 81-389).



here, (1) the state regulators possessed the power to overturn private action that violates the State's clearly articulated policy; (2) the regulators also were charged with the duty to ensure that rates comport with that standard; (3) aggrieved parties could seek relief from regulators; and (4) there was some form of judicial review. These elements are sufficient to establish active supervision. They "impl[y] the exercise (as well as the mere existence) of power because [they] impose[] legally enforceable duties on state officials—duties which a federal court may not, under normal principles of federalism, assume they will disregard." *New England Motor Rate Bureau, Inc.* v. *FTC*, 908 F.2d 1064, 1072 (1st Cir. 1990).

Indeed, these four elements were present in the regulatory system the Court addressed in *Southern Motor Carriers Rate Conf., Inc.* v. *United States*, 471 U.S. 48 (1985). In the subsequent *Patrick* litigation, both the FTC and this Court strongly indicated that the existence of such a regulatory structure is sufficient to establish active supervision. In view of the widespread use of this regulatory structure for rate regulation, the result could hardly be otherwise. Congress and the States obviously employ this approach precisely because they have concluded that it allows them to monitor rates effectively.

The FTC now argues that the active supervision inquiry should not turn on the regulatory structure established by state law, but should instead look to whether the state regulators are doing their job effectively. If the state regulation is deemed sufficiently rigorous, active supervision will be found. If, on the other hand, the regulators' level of activity falls short of what the federal agency or jury deems appropriate, state action immunity will not be available.

The FTC's position would transform the state action doctrine, which is designed to *preserve* state autonomy, into a tool for intrusive federal review of the adequacy

and effectiveness of state regulation. Not only would that standard produce unseemly intrusions upon state sovereignty, but it would also enable the FTC or the federal jury to substitute its own public interest determination for that of the state regulators, precisely the result that this Court has rejected in prior decisions construing the state action doctrine.

In addition, the FTC's approach simply is not manageable. How would the Commission or federal jury go about deciding whether the state regulators' scrutiny of private conduct was sufficiently rigorous? Presumably some sort of evidentiary record—consisting of testimony from regulators and excerpts from regulatory proceedings—would have to be developed in every case. That record would then be presented to the finder of fact, which would then apply the FTC's amorphous federal-law standard of rigorousness to the state regulators' actions.

Finally, the Commission's standard will significantly limit the regulatory alternatives available to the States, the precise result that *Parker* was intended to avoid. A State wishing to authorize collective ratemaking could no longer use the conventional regulatory system employed here: because regulated entities would face the risk that antitrust immunity would later be held unavailable on the ground that the state regulator failed to perform appropriately, those businesses would be deterred from exercising their authority to engage in collective ratemaking. A State that wanted to make collective activity a realistic option would have no choice but to subject all private conduct to full-blown administrative review, thereby ensuring that the federal "active supervision" standard would be satisfied. That would decrease regulatory efficiency and increase cost.

The Commission tries to defend its approach by asserting that its standard is necessary to permit the States to control the scope of antitrust immunity. But the States retain plenary control under the standard adopted by the



court of appeals and described above—they can ensure the application of the antitrust laws simply by stating in the governing statute that a regulatory system is not meant to supplant the free competition mandate of the Sherman Act.

II. The attorneys general of a number of States have filed a brief in this case purporting to address the questions presented by the FTC. But virtually the entire brief relates to a wholly distinct question—whether the clearly articulated policies of Montana and Wisconsin to supplant competition with regulation extended only to the filing of joint rating information or also reached joint ratemaking. The FTC has conceded that the two States clearly articulated a policy to authorize collective ratemaking, and an amicus may not properly interject new issues not presented by the party to the litigation. Accordingly, the question raised by the attorneys general is not before the Court in this case.

Indeed, the issue discussed by the attorneys general concerning the scope of *Parker* immunity in the regulatory context resembles one of the questions that will be presented in a certiorari petition that we plan to file shortly seeking review of *In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991). We urge the Court to await the case that properly presents the question before addressing that important—but distinct—issue regarding the scope of *Parker* immunity.

## ARGUMENT

### I. RESPONDENTS' CONDUCT IS PROTECTED UNDER THE *PARKER* DOCTRINE

#### A. The State Action Doctrine Of *Parker* v. *Brown* Rests On Fundamental Principles Of Federalism.

This Court's decision in *Parker* v. *Brown*, 317 U.S. 341 (1943), rests on the determination that "Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 56 (1985) (footnote omitted). Unrestricted application of the antitrust laws to state regulatory schemes would have prevented the States from engaging in *any* economic regulation. See *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 133 (1978) ("if an adverse effect on competition were, in and of itself, enough to render a state statute invalid [under the antitrust laws], the States' power to engage in economic regulation would be effectively destroyed"); Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & Econ. 23, 24 (1983) ("application of the antitrust laws would crimp the legislative authority of states far more effectively than the old substantive due process cases") (footnote omitted).

In holding that the States may adopt their own regulatory systems inconsistent with the free competition mandate of the Sherman Act, *Parker* relied on "principles of federalism and state sovereignty." *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1349 (1991). Indeed, the decision reflects the fundamental principle—which this Court had applied a few years before in curtailing substantive due process review—"that the states should be free to make their own economic decisions, whether or not they comport with the economic principles in vogue with the federal judiciary. * * * At the core of the *Parker* doctrine are higher policies of federalism and judicial economic neutrality which



counsel against intervention in state regulatory decisions." Verkuil, *State Action, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 Colum. L. Rev. 328, 334 (1975). See also Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486, 499 (1987) (describing *Parker* as "a case about judicial respect for the political process").

Preservation of the States' power to make their own regulatory choices has remained the touchstone of the state action doctrine. In *Southern Motor Carriers*, for example, the Court held that the state action doctrine protects private parties as well as public officials, reasoning that "[i]f *Parker* immunity were limited to the actions of public officials, * * * a State would be unable to implement programs that restrain competition among private parties." 471 U.S. at 56. The Court also rejected the contention that *Parker* immunity should be available only when state law compels private parties to engage in particular conduct, holding that state authorization of private conduct is sufficient because a compulsion requirement would "reduce[] the range of regulatory alternatives available to the State." *Id.* at 61.

Just last Term, in *City of Columbia*, 111 S. Ct. at 1350, the Court held "that in order to prevent *Parker* from undermining the very interests of federalism it is designed to protect," assertions that state or local officials exceeded their power under state law will not defeat antitrust immunity. Otherwise, the Court observed, the state action doctrine would "'dictate[] transformation of state administrative review into a federal antitrust job.'" *Ibid.* (citation omitted). The Court also refused to recognize a "conspiracy" exception to *Parker* immunity on the ground that such an exception would make governmental decisions "subject to *ex post facto* judicial assessment of 'the public interest,' * * * [which would] go[] far to 'compromise the States' ability to regulate their domestic commerce.'" *Id.* at 1352 (citation omitted).

**B. The Four States Actively Supervised Respondents' Conduct.**

1. The Court has developed a two-part test to determine whether particular private conduct was engaged in pursuant to a system of state regulation and is therefore immune from antitrust liability under *Parker*. First, "the Court has required a showing that the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy to replace competition with regulation.'" *Hoover* v. *Ronwin*, 466 U.S. 558, 569 (1984) (citation omitted). Second, "the policy must be 'actively supervised' by the State itself." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citation omitted).

There is no dispute that the first element of the Court's test is satisfied here. The FTC has stipulated that the four States clearly articulated a policy of permitting collective setting of rates for charges for title search and examination services. Pet. App. 37a; FTC Br. 9 n.6. The States have thus affirmatively decided to supplant competition with regulation. See *Southern Motor Carriers*, 471 U.S. at 51, 59-60 (discussing reasons why a State would authorize collective ratemaking). The FTC's repeated reference to "price-fixing" is nothing more than a disagreement with the States' policy choice (see Pet. App. 113a (dissenting opinion)) and cannot disguise the fact that respondents' concerted activity is conduct expressly authorized pursuant to the public policy of these States.

The focus of this case is thus *Midcal*'s "active supervision" requirement. The Court recently stated that "[t]he active supervision prong of the Midcal test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick* v. *Burget*, 486 U.S. 94, 101 (1988). The requirement is designed to prevent private parties from avoiding antitrust liability by "casting * * * a gauzy



cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106.

This Court's decisions establish that there can be no active supervision if state officials lack the power to forbid conduct that violates the governing state policy. In *Patrick*, for example, the Court held that Oregon did not actively supervise peer review decisions denying hospital privileges to doctors because no state official had "power to review private peer review decisions and overturn a decision that fails to accord with state policy." 486 U.S. at 102. Accord, *Midcal*, 445 U.S. at 105-106 ("[t]he State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts").

The present case differs significantly from *Patrick* and *Midcal*. It is clear that—to use *Patrick*'s terms—the officials in each of the four States "have" the power under state law to overturn the private decisions. Pet. App. 30a (Arizona), 32a (Connecticut), 34a (Montana), 36a (Wisconsin). The only question is whether the state officials "exercise" their power to oversee private decisions. As we now show, this element of the *Midcal* test is plainly satisfied.

2. It is undisputed that each of the four States had in place a regulatory structure for oversight of rate filings that (1) required the filing of rates with the state regulators; (2) directed the state regulators to ensure that rates charged by regulated businesses comported with the statutory standard; (3) permitted aggrieved parties to file challenges to proposed rates; and (4) provided for some form of judicial review. Pet. App. 30a-31a (Arizona), 32a-33a (Connecticut), 34a-35a (Montana), 36a-37a (Wisconsin).[2]

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[2] The decisions below do not address the power of affected parties to challenge filed rates, but a review of the governing statutes in-

That is sufficient to establish active supervision. What is crucial for purposes of *Parker* is the structure of the regulatory system established by the applicable state laws. Each of the States here charged its regulators with the duty to ensure that rates accord with the statutory standard and established a mechanism for reviewing and setting aside rates that failed to conform to the applicable state law standard. Such state regulatory schemes "impl[y] the exercise (as well as the mere existence) of power because [they] impose[] legally enforceable duties on state officials—duties which a federal court may not, under normal principles of federalism, assume they will disregard." *New England Motor Rate Bureau, Inc.* v. *FTC*, 908 F.2d 1064, 1072 (1st Cir. 1990).

As both the court below and the First Circuit have concluded,

> "[w]here as here the state's program is in place, is staffed and funded, grants to state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established. Otherwise, the state action doctrine would be turned on its head. Instead of being a doctrine of preemption, allowing room for the state's own action, it would become a means for federal oversight of state officials and their programs."

Pet. App. 28a (quoting *New England Motor Rate Bureau*, 908 F.2d at 1071).

Indeed, this Court's opinion in *Patrick* strongly indicates that the existence of such a regulatory structure is sufficient to establish active supervision. In describing that element of the *Midcal* test, the Court stated:

> the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct. Cf. *Southern Motor Carriers Rate Conference, Inc.* v. *United States, supra*, at 51 (noting that state public service commissions "have and exercise ultimate authority and control over all intrastate rates").

*Patrick*, 486 U.S. at 101. The regulatory system described in *Southern Motor Carriers* is essentially identical to those in the present case: common carriers were required to submit proposed rates that became effective if the state agency took no action within a specified period of time. See 471 U.S. at 50-51. By citing that system as an example of active supervision in the course of the discussion in *Patrick*, the Court indicated that such a system of regulatory oversight satisfies the *Midcal* test. Indeed, the *Patrick* standard employs precisely the same language ("have and exercise") the Court used to describe the rate regulation system in *Southern Motor Carriers*. That is further evidence that the Court intended to point to the rate regulation system described in the latter case as a system of state regulation that satisfies the active supervision requirement.

The government likewise pointed to the system in *Southern Motor Carriers* as a paradigm of active supervision throughout its amicus brief in *Patrick*, which was signed by the FTC as well as the Department of Justice. See Br. for the United States as Amicus Curiae Supporting

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dicates that a procedure is available. See J.A. 170-171 (Arizona), 177-178 (Connecticut), 196 (Montana), 201 (Wisconsin).

The FTC makes much (Br. 25-27) of the supposed inadequacy of the mandamus remedy. Whatever the merits of the Commission's argument in a situation where state oversight of private conduct could occur only in the context of a mandamus action, it is irrelevant here because the court of appeals did not rely solely on the availability of mandamus. The key fact here is that state law directs the regulators to oversee rates. The availability of judicial review simply bolsters that protection.

Petitioner 8, 12, 13, 16, *Patrick* v. *Burget*, 486 U.S. 94 (1988) (No. 86-1145). It is telling that the government, which thought the existence of active supervision so clear in *Southern Motor Carriers* that it *conceded* the point, and which affirmatively cited *Southern Motor Carriers* as an example of active supervision throughout the *Patrick* case, now seeks to escape the implications of *Southern Motor Carriers* by observing that "only application of the 'clear articulation' prong of the *Midcal* test was at issue in this Court." Br. 18 n.9. It is too late in the day to suggest that *Southern Motor Carriers* involved anything less than a prototype of active supervision.[3]

It would be most surprising if the result were otherwise. The system described in *Southern Motor Carriers* is the paradigm for rate regulation in this country. Under various federal rate regulation schemes, for example, proposed rates are filed with the regulatory body and permitted to go into effect if no regulatory action occurs within a specified time period. See, *e.g.*, 15 U.S.C. §§ 717c-717d (Natural Gas Act); 16 U.S.C. §§ 824d-824e (Federal Power Act); 47 U.S.C. §§ 201-204 (Communications Act); 49 U.S.C. §§ 10701-10713 (Interstate Commerce Act). And, as *Southern Motor Carriers* and this case

[3] Just as the Commission ignores this Court's (and its own) subsequent treatment of *Southern Motor Carriers* in arguing that the case did *not* involve "active supervision," so too the Commission is engaged in revisionist history in trying (Br. 20) to turn *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), into a case that *did* confront the question of "active supervision." The *Cantor* case was decided before *Midcal* and did not discuss the state action issue in the "clear articulation" and "active supervision" terms that have since become familiar. Nevertheless, analyzed in those terms, its holding is that the State had not *clearly articulated* a policy to supplant competition with regulation. *Id.* at 584-585, 594-595. See also *Southern Motor Carriers*, 471 U.S. at 64 ("in *Cantor* the anticompetitive acts of a private utility were held unprotected because the Michigan Legislature had indicated no intention to displace competition in the relevant market"). The decision does not address the active supervision issue and is irrelevant here.



demonstrate, that procedure is frequently employed by the States as well. The fact that this system of regulation is so widely used itself demonstrates that it meets the *Midcal* standard: Congress and the States obviously have employed this approach precisely because they have concluded that it enables regulators to monitor rates and ensure that regulated entities abide by the applicable statutory standard. That is what "active supervision" requires.[4]

3. The FTC nonetheless contends that this conventional model of rate regulation does not produce active supervision of the parties whose rates are being regulated, asserting (Br. 20) that what is required is "an affirmative determination by state officials that the particular anticompetitive activity at issue is consistent with state policy." Notwithstanding that statement, the FTC does *not* argue that the active supervision requirement is satisfied only if the State officially determines that the challenged conduct satisfies the applicable state law standard. The Commission specifically endorses (Br. 21 n.13) the result in *New England Motor Rate Bureau*, in which the First Circuit held the active supervision requirement satisfied by a system essentially identical in structure to the ones presented here: the private party was required to file its rates with the state regulatory agency, and those rates became effective unless the state agency initiated an investigation.

[4] The power to overturn private conduct is insufficient to establish active supervision when state officials have no obligation to measure the private conduct against the state policy, and may act *only* upon the initiative of a private party seeking relief from the private conduct. *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 345 n.7 (1986) (holding that discretionary authority to override resale prices set by wholesalers upon petition by retailer did not satisfy the *Midcal* active supervision requirement). As we have discussed, the regulators here had the power—and the duty—to act on their own initiative.

What does the FTC cite as the critical distinguishing fact? It relies solely on the fact that a rate analyst employed by the Massachusetts Department of Public Utilities testified that he examined all rate filings, that he would recommend suspension and investigation of a rate filing that seemed "out of line with the average rates" or "extraordinarily high," and that, in his opinion, "whenever tariffs become effective * * * that action results from a determination that the proposed rates meet the [applicable] regulatory criteria." 908 F.2d at 1073 n.12 (emphasis deleted).

The FTC's approach thus turns not on the statutory and regulatory structure established by state law but instead on whether—in the view of the Commission or the federal antitrust court—the record shows that the particular state regulators are properly carrying out their duties. Because the evidence indicated "that unreasonable rates [would] be rejected" by the Massachusetts regulators (908 F.2d at 1077), there was active supervision; because the evidence in this case supposedly shows that regulators in the four States do not fulfill their statutory duties with equal vigor, the FTC says that *Parker* should not apply. As we have already discussed, that position is inconsistent with this Court's discussion of the active supervision requirement in *Patrick* and finds no support whatever in this Court's decisions.

What is more, the FTC's position is fundamentally at odds with the policies underlying the state action doctrine.[5]

[5] The Commission tries (Br. 20 n.12) to support its position by reference to decisions defining the "state action" subject to the Fourteenth Amendment. Among other difficulties, the principal failing of the analogy is that—as the FTC itself states—even approval by the State of private conduct is insufficient to transform it into state action. *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005 (1982) ("[*m*]*ere approval of* or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible * * * under the terms of the Fourteenth Amendment") (emphasis added). Because even the Commission's interpretation of *Parker* fails the Fourteenth Amendment test, the analogy obviously provides no useful guidance in determining the proper contours of the active supervision requirement.



To begin with, as we have discussed (at 8-9), the purpose of the state action doctrine is to allocate decision-making responsibility between federal antitrust judges and juries and politically accountable state agencies with regulatory expertise in order to avoid "*ex post facto* judicial assessment of 'the public interest.'" *City of Columbia*, 111 S. Ct. at 1352. In the FTC's view, however, state regulators cannot be trusted to carry out their official responsibilities in accordance with the public interest. As Commissioner Strenio candidly stated, the Commission "insists upon taking a good look at whether State officials have exercised their regulatory authority," refusing to defer at all "to the presumption of the regular performance of official duties." Pet. App. 127a. "The FTC [or the federal court] would, in effect, try the state regulator" by inquiring "whether a particular state's regulatory operation demonstrates satisfactory zeal and aggressiveness." *New England Motor Rate Bureau*, 908 F.2d at 1075.

Certainly the Commission's discussion of the active supervision question in its decision in this case is nothing less than an in-depth critique of the way state regulators carried out their responsibiiities. See, *e.g.*, Pet. App. 59a ("the state insurance department suffered from a dearth of information that would have enabled it to assess the appropriateness of the filed rates"), 68a (holding that States may not base ratemaking on historical rates), 135a (concurring opinion) ("Arizona here could not actively supervise the industry for an extended period because it had no qualified personnel") (footnote omitted).

But such federal second-guessing of the quality of state regulation contravenes *Parker*'s core purpose of promoting federalism. In *City of Columbia*, the Court refused to

recognize a "conspiracy" exception under which *Parker* would not apply to "any governmental act 'not in the public interest,'" observing that such a test would require federal courts to reexamine the merits of decisions by local governments. 111 S. Ct. at 1352 (citation omitted). The Court stated that "*Parker* was not written in ignorance of the reality that determination of 'the public interest' in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, *and it was not meant to shift that judgment from elected officials to judges and juries.*" *Ibid.* (emphasis added).

The FTC argues for the very same reallocation of authority here, seeking to open the doors of federal courthouses to those dissatisfied with the state regulators' job performance. Federal review of the quality of state decisionmaking would be an unseemly intrusion upon State sovereignty, the very opposite of the respect demanded by "Our Federalism."[6] "It is not the province of the federal courts nor of federal regulatory agencies to sit in judgment upon the degree of *strictness* or *effectiveness* with which a state carries out its own statutes." *New England Motor Rate Bureau*, 908 F.2d at 1076 (emphasis in original). See also *Llewellyn* v. *Crothers*, 765 F.2d 769, 774 (9th Cir. 1985) (Kennedy, J.) ("actions otherwise immune [under *Parker*] should not forfeit that protection merely because the state's attempted exercise of its power is imperfect in execution under its own law"). State regulatory decisionmaking is subject to review under state law by both the judicial and political branches of state government. There simply is no warrant for federal intervention into that process.

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[6] *Younger* v. *Harris*, 401 U.S. 37, 44 (1971). Federal courts do not assess the quality of state court decisionmaking before deciding to abstain in favor of a state court proceeding. So too here, there is no justification for making the federal courts the forum in which to examine state officials' dedication to their duty.



The federal review proposed by the FTC will inevitably result in the substitution of public interest assessments by the FTC and federal antitrust juries for those of state regulators, the precise result rejected in *City of Columbia*. As the court of appeals observed, "[t]he FTC held that Arizona, Connecticut, Montana and Wisconsin failed *Midcal*'s adequate supervision prong because the regulators in those States were unqualified, they approved rates that the FTC's commissioners would not have approved and they generally did not regulate to the degree that the FTC found desirable." Pet. App. 37a.[7]

Indeed, the intrusion on state regulation that would result from the FTC's approach here is even greater than that threatened in *City of Columbia*. There, the federal court would have reapplied the state law standard, and could have reached a result different from that of the state or local official. Here, a federal court determination that the state regulators did not perform their duties with rigor would lead to total displacement of the state law standard, *even if it were clear that the rates would have been upheld under that standard.* The danger is not that the federal court would apply state law differently than the state regulators, it is that the state regulatory standards would be wholly superseded.[8] Only by focusing the

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[7] These different views of the public interest can take the form of disagreements about the amount of justifying information and review—and, therefore, of state resources—necessary to form a judgment about the lawfulness of the rates as well as disagreements about the substantive validity of the rates. Cf. *Heckler* v. *Chaney*, 470 U.S. 821 (1985) (declining to permit judicial second-guessing of federal agency's decisions not to take enforcement action).

[8] Under the FTC's approach, a party wishing to overturn new rates would be well advised not to raise objections in the state regulatory proceeding (which would be measured against the public interest standard established by state law), but to wait for the rates to take effect and file an antitrust action. If it could create doubts about the effectiveness of the state regulators, the challenger would

active supervision inquiry on the State's regulatory structure—and presuming that state officials do not violate their public trust but rather carry out their state law responsibilities—can the Court accommodate the need to ensure active oversight of private activity with the federalism values underlying *Parker*.[9]

Moreover, the FTC's proposed approach cannot be reduced to a judicially manageable standard. Would evidence of the regulators' general practices suffice? That is what the Commission relies on in defending the result in *New England Motor Rate Bureau*. In its decision in the present case, by contrast, the Commission assessed

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be able to avoid application of the state law standard altogether. Rates set collectively pursuant to state authorization would be invalid even if they would have been upheld under the State's public interest standard.

[9] The filed rate doctrine provides a useful analogy. Under that doctrine, rates permitted to go into effect by a regulatory agency with the power and duty to review them are conclusively presumed to satisfy the applicable statutory standard, without regard to whether the agency actually examined the particular rates. See generally *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354 (1988); *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951). The theory underlying the doctrine is that interested parties should be required to press challenges to the validity of the rate before the body with the power and expertise to make the public interest determination. The same rationale applies here. Cf. Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 668, 707 (1991) (because of state agencies' superior ability to judge the public interest, "the best that antitrust courts can do is channel decisions about" deviations from market competition "into a disinterested, politically accountable process"); Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 Calif. L. Rev. 227, 249-250 (1987) ("[t]he citizen participation value of economic federalism supports deference to state decisions that are the product of meaningful public participation in the decision to supplant competition with regulation. * * * [T]he important point is that the *opportunity* to participate exists * * *").



the state regulators' scrutiny of the particular rate filings subject to antitrust attack.

Regardless of which approach the Commission now deems proper, how would the factfinder—which in most cases will be a jury—go about its task? A "mini-trial" on the state regulatory process, complete with testimony or other forms of evidence from state regulators, would be required in every case.[10] Such retrospective examinations would always result in the sort of intrusive second-guessing presented at pages 22-24 and 27-31 of the Commission's brief: was the state review in practice a cursory review of the rate filing or did it involve a substantive assessment of the rates; was the supporting information supplied by the regulated entities sufficient to permit the regulators to undertake a substantive assessment; should the regulators' failure to fully scrutinize some rate filings suffice to establish that such a failure occurred in other cases; and the like.

> There simply is no way to tell if the state has "looked" hard enough at the data, and there certainly are no manageable judicial standards by which a court may weigh the various elements of a "public interest" judgment in order to determine whether the legislature or agency decision was correct. Those are political judgments and ought to be made by the legislature and its delegates.

1 P. Areeda & D. Turner, *Antitrust Law* ¶ 213c, at 75 (1978) (footnote omitted).[11]

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[10] The increased burden on the federal courts would be substantial because the fact-bound nature of the inquiry proposed by the FTC would make summary judgment virtually impossible in cases in which a state action defense is presented.

[11] Areeda and Turner take the position that active supervision exists only where the state regulatory structure requires official approval by state regulators. 1 Areeda & Turner, ¶ 213f. They thus disagree with the FTC—because they would base the active supervision determination on the state's regulatory structure, not

In addition to empowering the federal courts to review how well state officials discharge their state law duties, the FTC's approach will significantly limit the regulatory alternatives available to the States—precisely the result that this Court has construed *Parker* to avoid. See *Southern Motor Carriers*, 471 U.S. at 61. A State that wishes to authorize regulated entities to engage in collective ratemaking or other joint activities simply could not use the conventional regulatory system employed by the States here. Instead, it would have to adopt, under compulsion of federal law, a system that subjects every private action to full-blown administrative review.

That is so because, under the FTC's interpretation of *Parker*, businesses regulated under a system such as those employed by the four States would be unable to determine in advance whether their conduct would be immunized against antitrust scrutiny. Their immunity would depend on the results of the Commission's—or a federal

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on the intensity of state scrutiny (*New England Motor Rate Bureau* was wrongly decided under their view)—and disagree with the court below as well, because they would not find active supervision where rates may go into effect without official approval.

However, the latter conclusion appears to be based upon generalizations about the state regulatory process that are inapplicable here. Areeda and Turner suggest that "inaction evades statutory approval procedures designed" to allow opponents to challenge rates, assure conscientious decisionmaking, and permit judicial review. ¶ 213f, at 78-79. But, as we have discussed, these elements are all present in the regulatory systems at issue in this case. They also assert that agency inaction shows that the State has not clearly articulated its intent to supplant competition with regulation. ¶ 213f, at 78. It is conceded, however, that the four States here clearly authorized collective ratemaking. Areeda and Turner's conclusion is thus based on assumed gaps in the regulatory structure that simply do not exist here. The applicability of the state action doctrine should not turn on the "trivial" distinction between a state procedure that has the protections discussed above and permits proposed rates to go into effect without official action and one under which proposed rates are given formal approval. *New England Motor Rate Bureau*, 908 F.2d at 1071.



court jury's—*ex post facto* assessment of the adequacy of the state regulatory system. Collective activity would thus carry a risk that *Parker* would be inapplicable if the state regulation was later found to be insufficiently rigorous. Accordingly, businesses would be deterred from joint action for fear that they might be subjected to burdensome antitrust litigation and onerous sanctions, such as treble damages and criminal penalties.[12]

A State that wished to make its authorization of collective activity anything more than an empty hope would be forced to adopt a different regulatory structure—one that required regulators to review proposed rates with vigor and made affirmative approval a precondition to the rates' effectiveness. Such a system would almost certainly reduce regulatory efficiency and increase the State's costs. Constraining the States in that way is inconsistent with the purposes of *Parker*.

Remarkably, the FTC contends (Br. 14, 22) that its approach would *preserve* the States' regulatory options, intimating that a State's regulatory program might otherwise be held to immunize private conduct against antitrust scrutiny even if the State did not intend that result. But *Parker* applies only if a State clearly articulates its intention to supplant competition with regulation. A State that does not want to invoke *Parker* need only make clear in the governing statute that it does not intend to prescribe a different policy. Under the court of appeals' interpretation of *Parker*, therefore, the States retain complete control over the scope of antitrust immunity. It is the FTC that seeks to narrow dramatically the States' ability to choose how to regulate.

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[12] A business that wished to exercise its authority under state law to set rates collectively without the threat of antitrust liability would have to persuade the state regulators to scrutinize its proposed rates, and issue a determination on the merits, *even if the regulators were satisfied that the rates were in the public interest and believed that further scrutiny would be a waste of resources.* That result is truly perverse.

Finally, the Commission is engaged in nothing but hyperbole in asserting (Br. 22) that the approach taken by the court below "effectively abandons the active supervision requirement." It is the FTC that is seeking a sharp break with precedent in urging this Court to declare that one of the prevailing methods of rate regulation in this country does nothing more than "cast[] * * * a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106.

The decision below is entirely consistent with *Patrick* and *Midcal*, and the results in those cases affirm that the active supervision requirement is alive and well. A State still must endow regulators with the power to overturn private decisions and it still must charge regulators with the responsibility for ensuring that private conduct conforms to the public interest. Those are significant requirements that are sufficient to ensure that private conduct is subjected to meaningful review, while at the same time leaving the States with ample flexibility in fashioning their regulatory systems.

## II. THE ARGUMENTS ADVANCED BY THE STATE ATTORNEYS GENERAL DO NOT RELATE TO THE QUESTIONS PRESENTED IN THIS CASE

The amicus brief filed in this case by a number of state attorneys general purports to address the questions presented in the FTC's petition. See Wisconsin, et al. Am. Br. In fact, however, virtually the entire brief relates to a different issue: whether the clearly articulated policies of Montana and Wisconsin to displace competition with regulation were limited to the filing of joint rating information or extended as well to joint ratemaking. That issue is not presented here and may not properly be interjected into the case by amici.[13] That issue does,

[13] *Knetsch* v. *United States*, 364 U.S. 361, 370 (1960) (Court has "no reason to pass upon" an argument made by an amicus but not by the petitioners); see also *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 434 n.16 (1984); *Holland* v. *Illinois*, 493 U.S. 474, 487 n.3 (1990).



however, resemble one of the questions that will be presented, along with important McCarran-Ferguson Act questions, in a certiorari petition that we plan to file early next year seeking review of *In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991). We wholeheartedly agree with the attorneys general that the issue—how to determine the scope of *Parker* immunity in the regulatory context—is an important one that should be addressed by this Court. We urge the Court, however, to await the case that properly presents the issue.

As we have discussed, the FTC conceded that both Montana and Wisconsin clearly articulated a policy to authorize collective ratemaking. See page 10, *supra*; Pet. App. 184a ("[c]omplaint counsel concede that the joint rate making activity by rating bureaus * * * was authorized by state law"). The argument advanced by the attorneys general, however, is that Montana and Wisconsin authorized only "the pooling of experience data and the joint filing of rating information"; the regulatory schemes of those States assertedly "provide for competition to determine the actual level of rates." Am. Br. 13-14. See also *id.* at 18 ("[t]he statutes in Montana and Wisconsin rely upon competition to set title insurance rates").

Proceeding from that premise, the attorneys general argue that "[s]tate acquiescence in one activity (*i.e.*, the filing of pooled rating information) is not state review, much less approval, of a separate and distinct activity of classic horizontal price fixing regarding the underlying expenses in that filing." Am. Br. 21. The fact that *Parker* immunity is available for the first activity, they argue, does not render the second activity immune from antitrust scrutiny. For that reason, the attorneys general contend, collective ratemaking in the two States should not be immune under *Parker*.

Those claims cannot properly be pressed here, however, because of the FTC's concession that "the joint *rate making activity*" was authorized by state law (emphasis added). Indeed, *none* of the arguments advanced by the attorneys general in support of their theory of limited state authorization appears in the FTC's discussion of the Montana and Wisconsin regulatory systems. Compare Am. Br. 4-22 with FTC Br. 22-24.[14]

In making this new argument, the state attorneys general expressly rely (Am. Br. 21) on the Ninth Circuit's decision in *In re Insurance Antitrust Litigation, supra.* That litigation, which the States instituted for the avowed purpose of "'restructur[ing] the [insurance] industry,'"[15] has been characterized by one state official as "the biggest and most important civil case now pending in the United States."[16] Despite the attempt of the attorneys general to interpose it here, *Insurance Antitrust Litigation* does not bear on the present issue.

The Ninth Circuit in *In re Insurance Antitrust Litigation* overturned the district court's determination that the defendants were immune under *Parker.* The court of appeals did not reject the state action defense because it faulted the quality of the States' regulatory review (the issue that is presented here). As the attorneys general stated in their response to the rehearing petitions

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[14] The only similarity between the two briefs relates to a separate argument—the view that the availability of a mandamus remedy is not sufficient to establish active supervision. Compare FTC Br. 25-27 with Am. Br. 22-27.

[15] Kriz, *Insurers In Their Sights,* National Journal, Oct, 15, 1988, at 2598, quoting former Massachusetts Attorney General James M. Shannon.

[16] *Hearing Before the Subcomm. of the Senate Comm. on Commerce, Science and Transportation on Federal Trade Commission and International Antitrust Laws,* 100th Cong., 2d Sess. 24 (1990) (testimony of Lloyd Constantine, former Chief of Antitrust Enforcement for the State of New York).



filed in the Ninth Circuit in that case (at 9), "[p]laintiffs have never claimed * * * that state officials were negligent in their duties of review and supervision." Indeed, the record in that case is clear that the proposed insurance forms were the subject of continuous discussions with state regulators from 1984 through 1986 and were addressed both at public hearings and forums before insurance regulators in 35 States and at meetings of the National Association of Insurance Commissioners.[17]

Rather, the Ninth Circuit in *Insurance Antitrust Litigation*—observing that "state approval of one activity is not state approval of a related but distinct activity" (938 F.2d at 931)— believed that the States' authorization and approval of the collective development of insurance policy forms did not approve the alleged "boycotts used to produce agreement on the forms." *Ibid.* See also Plaintiffs' Response to Rehearing Petitions in *Insurance Antitrust Litigation* at 9 ("plaintiffs claim that the offending conduct, boycotts, was never submitted to them for review and approval"). The decision thus limits the reach of *Parker* on a ground distinct from that urged by the FTC in the present case.

We agree with the attorneys general that this Court should consider whether the Ninth Circuit's approach correctly defines the scope of state approval for purposes of *Parker* immunity. The Ninth Circuit's decision introduces new uncertainty into the state action question—

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[17] See paragraphs 4, 8, 10, and 11 of the affidavit of Carole Banfield, Senior Vice President of Government Relations of the Insurance Services Office, Inc., filed in the district court in *Insurance Antitrust Litigation.* Further, the state agencies made substantive determinations of conformity with state policy. See, *e.g.,* Ex. N in *Insurance Antitrust Litigation* ("[t]he undersigned [Connecticut insurance commissioner] is satisfied that the insurance industry has fairly demonstrated a need for a Claims Made form of insurance * * *. However, the changes which are being required prior to approval of such a policy form within this State are essential if the interests of the public are to be protected").

uncertainty, however, that is entirely unrelated to the question presented in this case and that accordingly will not be resolved by the Court's decision here. Given the tremendous practical importance of the Ninth Circuit's decision, we submit that the Court should address this separate question by granting the certiorari petition seeking review of *In re Insurance Antitrust Litigation*. It should not consider the issue here, where it has not been raised by the FTC and is wholly distinct from the questions on which certiorari was granted.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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